THE FIVE NEW AND IMPORTANT FEDERAL QUESTIONS HERE PRESENTED.

I.

Whether, Where Prior to 1935 Employees, on Their Own Initiative, Have Organized a Labor Organization Restricted to the Company's Employees, Which Has Not Been Dominated by the Company But in the Organization of Which It Furnished Assistance at the Express Request of the Employees, the Same "Cleavage" Is Required to "Wipe the Slate Clean" as in the Case of a Union Admittedly Initiated and Dominated by the Company.

A number of disestablishment cases have come to this Court involving "inside" unions, which had been initiated, organized and dominated by the employer prior to the passage of the Wagner Act in 1935, and in which the Board was sustained in holding that such domination persisted after 1935 in the absence of proof that its effect was nullified and dissipated by subsequent and unequivocal acts on the part of the employer, which "wipe the slate clean" by effecting a distinct cleavage in the minds of the employees between the old organization and the new one.

In each of these cases the Association, prior to 1935, had been admittedly the creature of the company and dominated by it.

In the first *Greyhound* case, "before the enactment of the National Labor Relations Act, respondents . . . initiated a project for their organization under company

domination";[6] in the second, respondent, following the organization of the Association in 1933 "continuously interfered with and dominated the internal administration of the Association."[7]

In the *Newport News* case, the Representation Plan was organized in 1927 and continued to operate for ten years with an equal number of employee and management representatives whose every decision "was dependent upon approval by respondent's president."[8] Even under the Revised Plan of 1937, the action of the Employee's Representative Committee "shall be final and become effective upon agreement by the company,"[9] and the plan could not be amended if the company disapproved of the amendment.[10] The respondent in that case conceded that the plan, prior to its revision in 1937, conflicted with the provisions of the Wagner Act,[11] during which period the plan had been clearly dominated by the company.[12]

In the *Falk* case "shortly after the passage of the National Industrial Recovery Act in 1933 (48 Stat. 195, 198), respondent brought into being a company dominated union of its employees called the 'Works Council' which functioned under company control until April, 1937."[13]

In the *Link-Belt* case, from 1933 down to the date (April 12, 1937), when the *Jones and Laughlin* case was decided by this Court, "the employer, Link-Belt Co. had

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[6] 303 U. S. 261, 268.
[7] 203 U. S. 272, 273; see also p. 274.
[8] 308 U. S. 241, 246.
[9] Id. p. 249.
[10] Id. p. 247.
[11] Id. p. 249.
[12] See id. p. 251.
[13] 308 U. S. 453, 460.

maintained a company union," apparently continuing to recognize it even after the passage of the Act of 1935 and even though under the Act it was concededly an improper bargaining unit.[14] Although in that case it appeared that the independent union which in April, 1937, succeeded the company union was organized at the instance of the employees, it was apparently conceded that the company union of 1933 was both organized and maintained by the company.

In the *Westinghouse* case,[15] where this Court affirmed a disestablishment order on the authority of the *Newport News* and *Link-Belt* cases, the plan had been organized by the company in 1933 and operated under company domination for four years, when it was "revised" by a joint committee of men and management, still containing a provision whereby the company could remove a Representative by discharging or transferring him (see 112 F. (2d) 657, 659).

In the *Automotive Machine*[16] case, where this Court reversed the Circuit Court of Appeals for the Seventh Circuit, per Curiam, and sustained the Board's disestablishment order on the authority of the *Link-Belt* and *Westinghouse* cases, the Association was not formed until 1937 and then was established by means of the important gratuitous, unsolicited and effective assistance of the company.

Finally, in the *Southern Bell Telephone & Telegraph* case[17] this Court expressly stated that "the Association prior to the passage of the National Labor Relations Act

[14] 311 U. S. 584, 586.
[15] 312 U. S. 660.
[16] 315 U. S. 282.
[17] 63 S. Ct. 905, 912.

in 1935 was obviously a company dominated and supported union."

In all of these cases, therefore, the pre-1935 company union was initiated, organized and actually dominated by the company both before and for two years after the passage of the Act of 1935, and for at least four years prior to the reorganization of each of the unions following the *Jones & Laughlin* decision on April 12, 1937. The case at bar is the first in which the Board has been sustained in requiring the same sort of cleavage where there has been no actual domination prior to 1935, but merely the furnishing of facilities at the employees' express request, in order to enable them to obtain the rights guaranteed them by the Acts of 1933 and 1935.

Obviously where an Association is the mere creature of the company which admittedly has long dominated its activities, this impression of domination would naturally persist unless the employer did something very positive, unequivocal and convincing to dispel the long-standing impression of favoritism. Where, however, all that the company has done is to cooperate with its employees in an attitude of "friendly interest" in furnishing facilities to enable them to hold an election of representatives, (which, at the time, was not unlawful) there is no long-standing impression of dominance to be dispelled. If, prior to the passage of the Act of 1935, such assistance is permanently discontinued, and thereafter the company accords the union no support except as the result of collective bargaining, nothing further is necessary.

II.

How Far an Honest Election, Held in 1934 at the Instance of and Under Directions Prescribed by the Then Director if the N. I. R. A. in Which the Employees, in Fair Election, by Secret Ballot, Chose Their Own Organization as Against the A. F. of L. Local, Followed by Such Director's Written Approval of the Employees Association as Constituting "the Employee Representation That a Majority of the Men Now Desire," Justified the Company in Thereafter Thus Recognizing Such Association, Irrespective of Any Assistance Accorded It, at the Request of the Employees, Prior to Such Election.

There has been no disestablishment case in this Court where, as here, the disestablished association was chosen by the employees prior to 1935 in an honest election, with the A. F. of L. or C. I. O. as an active candidate on the ballot, conducted at the suggestion of the Government officials responsible for administering the National Industrial Recovery Act, under regulations and with notices to the employees and posted notices by the employer as prescribed by such officials.

In the *Newport News* case, the vote taken by the employees was *ex parte*, consisting merely of the election of representatives, with no outside union contesting and hence no opportunity of any other choice.

In the *Westinghouse* case there was "an election under the auspices of disinterested outside persons" at which a large proportion of the voters favored the new "Independent" over the A. F. of L. and C. I. O., but at this election only 1015 of the 2300 employees actually voted. Nor did it appear that in connection with this election the Westing-

house Company had posted notices disclaiming discrimination. In the case at bar the election of March 9, 1934, was held at the suggestion and under regulations prescribed by Wm. H. Davis, Compliance Director of the N. I. R. A. after a spirited contest between the employees association of the local of the A. F. of L., the ballot giving the voters choice between the four alternatives specified above (p. 6 hereof).

3152 employees voted for the Association and but 1995 for the A. F. of L. In connection with this election the Company posted notices in the form prescribed by Mr. Davis, advising the employees of their rights under the N. R. A. and guaranteeing them "perfect freedom of action." As a result of it, General Johnson, the director of N. R. A., posted a statement as follows:

> "I think that Mr. Budd has acted in complete good faith; that Mr. Budd has attempted to comply with the law; that the present condition is due to a series of misunderstandings. I believe that there is the employee representation that a majority of the men now desire." (1289a.)

In the *Telephone* case the "election" on which the company relied as validating the admittedly unlawful association was *ex parte*, with no other candidate in the field, was not secret and was conducted by mail by the employees themselves. In the case at bar the election was held pursuant to instructions by the officers of the N. R. A. and was a culmination of an intensive drive by the American Federation of Labor.

III.

Whether Facilities Furnished, by an Employer After 1935, in Good Faith, as the Result and as a Part of Its Bona Fide Collective Bargaining With a Labor Organization Thus Recognized as the Accredited Bargaining Agency of All Its Employees, Constitute the Contribution of "Financial or Other Support" to It Prohibited by Section 8 (2) of the Act.

Under the Act there is obviously an important difference between support or facilities *gratuitously* furnished by an employer to its employees for the purpose of enabling them to form an association favored by the employer, and facilities furnished at the *express request* of the employees, to assist them in electing bargaining representatives in the precise manner which they desire and to enable them to secure the rights given them by the statute. There is also a clear distinction between the *gratuitous* furnishing of support and facilities in furtherance of the *formation* of an association (such as appeared in the *Automotive* case, see 13 N. L. R. B. 343) and the furnishing of facilities on the insistence of an employees' association already recognized as the authorized bargaining agent for all the employees and as a part of the collective bargain entered into with them. This distinction is clearly presented on the present record but was ignored by the Board and the Court. Its recognition is most important in the interpretation and administration of this Act. This is the first case in which the question has been squarely presented to this Court. That the Act must necessarily contemplate a distinction between facilities and support *gratuitously* furnished the employees prior to their organization, and that subsequently

furnished as *part of the collective bargaining agreement* is evident when we consider that the whole basis on which every labor union exists is by the concessions which, through its collective effectiveness, it exacts from the employer. This, in fact, is the sole justification for the legality of the check-off (which, unlike the closed shop, is not specifically provided for in the Act), this being the most obvious item of "support" direct to the union. Similarly, as this Record shows, (see Resp. Ex. 39, R. 1371a) the standard union contracts provide for the use by the union of Company bulletin boards, for special seniority for union officers, for meetings on Company property (items II & III, Rec. pp. 1371-2a) and similar facilities.

It is respectfully submitted that this problem is eminently one on which both the Board and the lower Courts require enlightenment from this Court.

IV.

Whether an Employer Who, Since Prior to 1933, Had Granted a Vending Concession Within Its Plant to a Non-profit Corporation (Whose Funds Were by Its Charter Devoted Solely to the Welfare of the Employees), May, Without Violating the Act, Continue Such Concession From March, 1937, With Knowledge That the Concessionaire Corporation Had Agreed With the Employees Association to Give the Latter a Part of the Profits From the Concession in Consideration of the Association's Stimulation of Sales.

The fourth important question first presented to this Court by the present record is whether an employer who, in good faith, has recognized a labor organization as ex-

clusive bargaining agent for its employees may, as an essential part of the collective bargain demanded by the employees, agree that the Association may have a participation in a vending concession within the plant, in consideration of the Association's stimulation of sales to its employees, whereby the Association, without expense to the Company, may be partially supported from the profits on sales to its own members.

In the case at bar, the Employees' exchange, to which the vending concession shared by the Association was granted by the Company, had been organized long prior to 1933 as a non-profit corporation, all of whose funds were devoted, according to its charter, to the welfare of the employees. This is not a case where the Company invented and put into effect a concession for the benefit of an Association initiated and supported by it, as a device to get around the prohibitions of the Act. When in March, 1937, this Company acquiesced in the Association's having an interest in the concession, it was after demand for this by the Representative of a Union with which the Company had been bargaining in good faith for three years, with no other organization in the field, and none to appear for four years more.

V.

How Far, Under Present War Conditions, Does the Effectuation of the Policies of the Act Require the Disestablishment at This Time of This Association?

In *Southern Steamship Co. v. N. L. R. B.*, 316 U. S. 31, this Court pointed out that, in administering the provision of Section 10 (c) of the Act authorizing the Board to make such affirmative orders as will effectuate the poli-

cies of the Act, there are other Acts of Congress which the Board must consider in addition to the Wagner Act, one of these other Acts being that forbidding mutiny on ships, which in that case the Board had ignored. When the Board issued its order in the case at bar, disestablishing this union which had apparently satisfied these employees for eight years, there were other Acts of Congress which the Board should have considered, Acts designed to secure a maximum production of the war materials to which the entire plant of this Company is exclusively devoted.

Since the issue of the order in this case, and while the case was pending in the Circuit Court of Appeals, Congress inserted as a rider to the Appropriation Act of July 12, 1943, the provision that no part of the funds appropriated to the Board should be used in any way in connection with a complaint case arising over an agreement between management and labor which had been in existence for three months or longer without complaint being filed.[18] When this provision was being debated in Congress, Senator McKellar said of it: "The purpose of this provision is to stabilize labor relations" (see 13 Labor Relations Reporter, page 239).

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[18] Public Law 135:

"No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed: Provided, That, hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice, containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by an interested person."

While, of course, this proviso is not directly applicable to the present case, since the complaint was filed by the C. I. O. in 1941, (seven years after the original collective bargaining agreement between the Company and the Association), nevertheless, the proviso constitutes a clear declaration of Congress that, at this time of stress, the Wagner Act is not to be so enforced as to disturb labor relations. It is difficult to imagine how anything could create a greater labor disturbance in the Budd plant than to abolish this organization on which now for nine years these men have relied as their authorized bargaining agent, and to throw the ten thousand (now sixteen thousand) men in this war plant into the turmoil of a labor contest.

THE DISCHARGE CASES.

The cases of Milton Davis and Walter Wiegand in which the Company is found to have discriminated against them on account of their membership in and activity in the C. I. O. present squarely the question as to whether the Board is justified in relying solely on hearsay testimony or on mere unsupported inference for an essential finding.

Unless the Company knew or had reason to know that Wiegand was a member of or active in the C. I. O. there was no basis for the finding that his discharge was for this reason. The only testimony in the record from which this inference could be drawn was Wiegand's hearsay statement that the day before his discharge he had been told by Mullen (another Employee Representative, not a Company supervisor) that he, Wiegand, and Mullen had been seen talking to a union organizer, and that Mullen had accordingly got him "in a jam."

In the case of Milton Davis, there was no substantial testimony that the Company knew that he was a member of or active in the C. I. O. The only testimony on which the Board could have based its finding was Davis' statement that after he was laid off, he distributed union leaflets at the plant gates, but he did not say that he was seen doing this by any Company supervisor, the only names he mentioned being those of the employee Representatives by whose knowledge the Company could not be bound.

The cases of Wiegand and Davis hence present the important question as to whether the Board is justified in relying for an essential finding on hearsay testimony or on testimony legally insufficient to support the finding. While the *dicta* of this Court in *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229-230, fully support petitioner's position in this case, the question has not been squarely presented for decision, as it is here.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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